Bintulu Development Authority v Pilecon Engineering Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–02–458 OF 2004
ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND NIK HASHIM JJCA
23 FEBRUARY 2007

Arbitration — Agreement — Reference of dispute — Whether there was ad hoc reference to arbitrator

Arbitration — Arbitrator — Appointment — Whether validly appointed — Conduct of parties estopped from denying arbitrator validly appointed

In the instant case, several questions had been referred to the High Court pursuant to s 22(1)(a) of the Arbitration Act 1952. The appellant was dissatisfied with the High Court's determination of the questions and thus appealed to the Court of Appeal.

Held, dismissing the appeal with costs:

(1) What was sought to be impugned in the High Court was the appointment of the arbitrator and not the letter of appointment. Since the validity of the letter of appointment was not challenged, there was no necessity for the High Court judge to make any finding thereon. The Judge was right. He did not even need to consider the possibility of mistake based on circumstances leading to the letter of appointment that the appellant on appeal alleged existed. The issue of mistake was not even posed by the arbitrator for the decision of the High Court. Therefore, the need to consider it did not arise (see para 5).

(2) In the instant case, after reference to the arbitration the parties engaged actively in the arbitration proceedings. Both parties, inter alia, were involved in the nomination of and appointment of the arbitrator. They attended the preliminary meeting with the arbitrator. The respondent served the points of claim and the appellant made an interlocutory application for further and better particulars. All these showed that there was clearly an ad hoc reference to the arbitrator. The parties must have also acknowledged the validity of the reference to the arbitration when they invoked s 22 of the Arbitration Act 1952 to refer the questions of law for the decision of the High Court. Further, the letter of appointment was jointly made and constituted a fresh or an ad hoc agreement. It was the result of a continuous agreement to arbitrate (the arbitration clause 43 of the contract) crystallized into an individual agreement to arbitrate (the letter of appointment) (see paras 13–14).

(3) The letter of appointment remained a valid ad hoc agreement to appoint the arbitrator thus empowering him with the necessary jurisdiction to hear the matter (see para 15).

(4) In the instant case, in view of the appellant's conduct it was not entitled to dispute the validity of the arbitration proceedings. The appellant had participated in the arbitration proceedings from the inception. The parties had intended the letter of appointment to be binding on them and there was no mistake with regard to that. The High Court judge was therefore correct in permitting estoppel to be raised and holding that the arbitrator was validly appointed and had jurisdiction to hear the matter (see para 18).

[Bahasa Malaysia summary

Dalam kes ini, beberapa persoalan telah dirujuk ke Mahkamah Tinggi menurut s 22(1)(a) Akta Timbangtara 1952. Perayu berasa tidak puas hati dengan keputusan persoalan tersebut dan merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Apa yang ingin dipersoalkan di Mahkamah Tinggi adalah berhubung pelantikan penimbangtara dan bukan surat pelantikan. Memandangkan kesahan surat pelantikan tidak dicabar, tiada keperluan untuk hakim Mahkamah Tinggi membuat apa-apa keputusan. Hakim adalah betul. Beliau juga tidak perlu menimbangkan kebarangkalian kesilapan berdasarkan keadaan yang membawa kepada surat pelantikan yang mana perayu dalam rayuan mengatakan wujud. Persoalan kesilapan tidak ditimbulkan langsung oleh penimbangtara untuk keputusan Mahkamah Tinggi. Oleh itu, keperluan untuk membuat pertimbangan tidak timbul (lihat perenggan 5).

(2) Dalam kes ini, setelah merujuk kepada penimbangtara pihak-pihak terlibat secara aktif dalam prosiding timbangtara. Kedua-dua pihak, antara lain, terlibat dalam pencalonan dan pelantikan penimbangtara. Mereka hadir dalam mesyuarat awal dengan penimbangtara. Responden telah menyampaikan perkara-perkara yang dituntut dan perayu telah membuat satu permohonan interlokutori untuk butir-butir lanjut. Kesemuanya menunjukkan bahawa jelas terdapat rujukan ad hoc kepada penimbangtara. Pihak-pihak semestinya telah mengakui kesahan rujukan kepada timbangtara apabila mereka menggunakan s 22 Akta Timbangatara 1952 untuk merujuk persoalan undang-undang untuk keputusan Mahkamah Tinggi. Bahkan, surat pelantikan telah dibuat bersama dan membentuk perjanjian baru atau ad hoc. Ia adalah akibat daripada satu perjanjian berlanjutan untuk menimbangtara (fasal timbangtara dalam kontrak) yang membentuk menjasi satu perjanjian berasingan untuk timbangtara (surat pelantikan) (lihat perenggan 13–14).

(3) Surat pelantikan itu masih satu perjanjian ad hoc yang sah untuk melantik penimbangtara dan oleh itu memberi kuasa kepadanya dengan bidang kuasa yang sewajarnya untuk mendengar perbicaraan (lihat perenggan 15).

(4) Dalam kes ini, berdasarkan perbuatan perayu ia tidak berhak untuk mempertikaikan kesahan prosiding timbangtara. Perayu terlibat dalam prosiding timbangtara dari mula. Pihak-pihak berniat agar surat pelantikan itu mengikat ke atas mereka dan tiada kesilapan berhubung itu.

Hakim Mahkamah Tinggi oleh demikian adalah betul dalam membenarkan estopel ditimbulkan dan memutuskan bahawa penimbangtara telah dilantik dengan sah dan mempunyai bidang kuasa untuk mendengar perbicaraan (lihat perenggan 18).] A

Notes B

For cases on appointment of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1244–1252.

For cases on reference of dispute, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1222–1232.

Cases referred to C

Bahamas International Trust Co Ltd & Anor v Threadgold [1974] 1 WLR 1514 (refd)

Bintulu Development Authority v Pilecon Engineering Bhd [2004] 5 MLJ 449 (refd)

Jones Engineering Services Ltd v Balfour Beatty Building Ltd & Anor (1992) 42 ConLR 1 (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 4 MLJ 38 (refd) D

Legislation referred to

Arbitration Act 1952 s 22(1)(a)

Appeal from: Originating Summons No 24–277 of 2002–1 (High Court, Kuching) E

Rabindra S Nathan (Lee Chuang Eng with him) (Ee & Lim) for the appellant.
Khoo Guan Huat (Suaran Singh with him) (Cheng & Associates) for the respondent.

Nik Hashim JCA (now FCJ, delivering judgment of the court): F

BACKGROUND

[1] The arbitrator, Tan Sri Datuk Amar Chong Siew Fai (the former Chief Judge of Sabah and Sarawak) at the request of the appellant and the respondent, referred by way of case stated pursuant to s 22(1)(a) of the Arbitration Act 1952 ('the Act') five questions of law for the determination of the High Court. The five questions posed and the answers given by the learned judge as reported in *Bintulu Development Authority v Pilecon Engineering Bhd* [2004] 5 MLJ 449 are as follows: G

(1) Q: Whether or not a dispute or difference had arisen between the appellant and the respondent; H

A: No.

(2) Q: If the answer to (1) above is in the affirmative was there a reference of the dispute or difference by the respondent to the Engineer for a decision?;

A: As the answer to (1) above is 'No', this question does not arise for consideration. I

(3) Q: If the answer in (2) above is in the negative can the arbitration be proceeded with and continued further?;

A: Notwithstanding that question (2) was not answered, the answer is 'Yes' in view of the answer to questions (4) and (5).

(4) Q: Alternatively whether the arbitrator has been validly appointed by the parties pursuant to the Letter of Appointment dated the 12 December 2001;

A: Yes.

(5) Q: In the further alternative whether the appellant in view of their conduct as stated in the statement of agreed facts is now entitled to dispute the validity of the arbitration proceedings.

A: No.

[2] Dissatisfied with the decision, the appellant appealed to us. On 14 May 2005, we unanimously dismissed the appeal with costs and affirmed the decision of the learned judge and further ordered that the deposit be paid to the respondent to account of its taxed costs.

[3] The appeal before us was directed against the learned judge's answers to questions (3), (4) and (5) of the case stated. The appellant contended that the answers to the questions were erroneous on the grounds that:

(i) since the learned judge had made a finding that there was no dispute or difference between the parties, there was no valid reference to arbitration could have been made as there was a mistaken belief with regard to the existence or otherwise of a dispute or difference between the parties.

(ii) the letter of appointment was vitiated on the ground that there was a mistake; and

(iii) the doctrine of estoppel did not arise in this case as the recital in the letter of appointment was premised on a mistake.

[4] It is worthy of note that the proceedings under s 22 of the Act for the decision of the High Court judge were purely for the consideration of matters of law posed to him which arise in the course of the arbitration proceedings. Thus, the learned judge, when making his findings on questions (4) and (5), was entitled to treat and indeed treated them independently of questions (1) and (2). Questions (4) and (5) too were separately considered by the learned judge and they were drafted as stand-alone questions, which are to be answered in the alternative to the other questions,

[5] With regard to question (4) which read:

(4) Alternatively whether the arbitrator has been validly appointed by the parties pursuant to the Letter of Appointment dated 12 December 2001.

it is clear that what was sought to be impugned before the learned judge was the appointment of the arbitrator and not the letter of appointment dated 12 December 2001. Since the validity of the letter of appointment was not challenged, we therefore agree with the respondent that there was no necessity for the learned judge to make any finding thereon. As such, the learned judge was right in that he did not even need to consider the possibility of mistake based on circumstances leading to the letter of appointment that the appellant now alleges to have existed. Furthermore, the issue of a mistake was not even posed by the arbitrator for the decision of the High Court and therefore, the need to consider it does not arise.

WAS THERE AN AD HOC AGREEMENT?

[6] It was the submission of the appellant that when the parties entered into the Letter of Appointment, they were acting on a mistake of fact because they were under the assumption that there were disputes and differences between them resulting in the operation of clause 43 of the General Conditions of Contract which reads:

> Arbitration
>
> 43(a) If any dispute or difference shall arise between the Authority (the appellant) and the Contractor (the respondent), either during the progress or after completion of the Works, or after the determination of the Contractor's (the respondent's) employment, or breach of this Contract, as to:
>
> (i) the construction of this Contract, or
>
> (ii) any matter or thing of whatsoever nature arising under this Contract, or
>
> (iii) the withholding by the Engineer of any certificate to which the Contractor (the respondent) may claim to be entitled, then such dispute or difference shall be referred to the Engineer for a decision.
>
> (b) The Engineer's decision which is to be in writing shall subject to subclause (e) hereof be binding on the parties until the completion of the Works and shall forthwith be given effect to by the Contractor (the respondent) who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.
>
> (c) If the Engineer fails to give a decision for a period of forty five (45) days after being requested to do so by the Contractor (the respondent) or if the Contractor (the respondent) is dissatisfied with any decision of the Engineer, then in any such case the Contractor (the respondent) may within forty five (45) days after the expiration of forty five (45) days after he had made his request to the Engineer, or forty five (45) days after receiving the decision of the Engineer, as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person to be agreed between parties to act as the Arbitrator.
>
> (d) — (j)...

[7] Since the High Court answered question (1) of the case stated that there was no dispute or difference between the parties, the appellant argued that there was no valid reference to arbitration could have been made by the respondent, and as such

A the letter of appointment did not amount to, and could not be construed as an 'ad hoc' agreement to arbitrate.

[8] With respect, we do not agree with the appellant. In *Jones Engineering Services Ltd v Balfour Beatty Building Ltd & Anor* (1992) 42 ConLR 1, the plaintiffs, Jones
B Engineering Services Ltd (Jones) were invited by the defendants, Balfour Beatty Building Ltd (Balfour Beatty), to tender for electrical and mechanical engineering work in connection with a project known as 13–14 Appold Street, London EC2, in respect of which Balfour Beatty was the main contractor. The tender was based on the provisions of DOM/1 and documents annexed thereto. There were certain exchanges to start off with as of the contractual basis of the work prior to and shortly
C after work commenced in February 1988. The work then continued and was completed but disputes arose as to the scope of the agreement and in particular whether two documents called 'programme sections' were included in it.

[9] On 15 September 1989, Jones gave notice to Balfour Beatty of their intention
D to refer the disputes to arbitration and subsequently an arbitrator was appointed by the President of the Royal Institution of Chartered Surveyors, purportedly under the provisions of cl 3.1. of DOM/1, which reads as follows:

> In the event of any dispute or difference between the contractor and sub-contractor whether
E arising during the execution or after the completion or abandonment of the sub-contract works or after the determination of the employment of the sub-contractor under sub-contract DOM/1 whether by a breach or in any other manner in regard to any matter or thing of whatsoever nature arising out of the sub-contract or in connection therewith then either party shall give to the other such notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to arbitration.

F

[10] The arbitrator held a preliminary meeting on 5 March 1990 which was attended by both parties. He issued directions for pleadings and other matters and pleadings relying on the provisions of DOM/1 were subsequently served by both parties. However, on the first day of the hearing, the plaintiffs' counsel raised an issue
G as to the validity of the sub-contract and, as the hearing proceeded the status of the 'programme sections' was raised. The arbitrator directed that the parties should make written submissions to him on this point and they subsequently did so.

[11] The arbitrator, having considered those submissions, expressed a preliminary view on the issue, whereupon Balfour Beatty challenged the jurisdiction of the
H arbitrator on the ground that there was no concluded contract between the parties. Jones applied to the court for declarations (as opposed to our case — for case stated) as to the validity of the arbitrator's jurisdiction.

[12] The principal issue before the court was that, even if there was no sub-contract
I between the parties, there was an ad hoc agreement to submit the disputes to arbitration in accordance with cl 3 of DOM/1 and that, in light of the parties' conduct during the hearing, estoppel by convention precluded Balfour Beatty from attacking the arbitrator's jurisdiction. In that case, the High Court held:

(1) There was an ad hoc reference to arbitration on the terms of cl 3 of DOM/1 and that ad hoc reference was entered into at or immediately after the arbitrator's appointment when the parties appeared before him, got directions and fulfilled them. That was repeatedly reaffirmed, including in particular the exchange of pleadings, the continuation over 13 full or part days of the hearing, and by the detailed responses to the arbitrator's directions for submission on the 'programme sections' issue. All this was evidenced by numerous documents and the evidence showed beyond doubt that this fell within the definition in s 32 of the Arbitration Act 1950 and was therefore a valid ad hoc submission to arbitration.

[13] Likewise in the present case after reference to the arbitration, the parties engaged actively in the arbitration proceedings wherein both parties, inter alia, were involved in the nomination of and appointment of the arbitrator; they attended the preliminary meeting with the arbitrator; the respondent served the points of claim; and the appellant made an interlocutory application for further and better particulars. All these go to show that there was clearly an ad hoc reference to the arbitrator. Moreover, the parties must have acknowledged the validity of the reference to the arbitration when they invoked s 22 of the Act to refer the five questions of law for the decision of the High Court.

[14] Further, the letter of appointment was jointly executed by the parties following an exchange of five letters on the appointment of the arbitrator. The letter of appointment is a joint document which states:

> THIS LETTER OF APPOINTMENT is **jointly made** the 12th day of December, 2001, by PILECON ENGINEERING SDN BHD (Co No 29223-P), the Claimant (the respondent) herein, and BINTULU DEVELOPMENT AUTHORITY, the Respondent (the appellant) herein. (Emphasis added.)

It then proceeds to 'JOINTLY APPOINT TAN SRI DATUK AMAR CHONG SIEW FAI as the sole arbitrator for the purposes of clause 43 of the General Conditions of Contract.' It is therefore clear from the recital that the letter of appointment was jointly made and thus constitutes a fresh or an ad hoc agreement. It is the result of a continuous agreement to arbitrate (the arbitration clause 43 of the underlying contract) being crystallized into an individual agreement to arbitrate (the letter of appointment).

WAS THE LETTER OF APPOINTMENT VITIATED BY MISTAKE?

[15] The next issue is whether the letter of appointment was vitiated by mistake. According to the appellant the mistake is one of fact based on the point that it relates to misapprehension of the underlying facts and background events leading up to the invoking of clause 43 and the appointment of the arbitrator. However, we do not agree with the appellant. The underlying facts and background events are not in dispute. The facts have been agreed. If at all, what was misapprehended was the inference or conclusion to be drawn from the settled facts to be applied within the arbitration clause 43. Such an inference or a conclusion is a matter of construction

by the court. It is trite law that the construction of a written document is a question of law and not fact (see *Bahamas International Trust Co Ltd & Anor v Threadgold* [1974] 1 WLR 1514 (HL); *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 4 MLJ 38 (CA). Hence, the existence of mistake as alleged by the appellant, even if applicable, is at most a mistake of law. A mistake of law will not have any vitiating effect. The letter of appointment remains a valid ad hoc agreement to appoint the arbitrator thus empowering him with the necessary jurisdiction to hear the matter.

ESTOPPEL

[16] On the question of estoppel, the learned judge said at p 466 para 40 of his judgment:

> Here, it was the respondent (appellant) who had initially nominated Tan Sri Datuk Amar Haji Jemuri Serjan as arbitrator but when he declined appointment agreed to the appointment of Tan Sri Datuk Amar Chong Siew Fai as arbitrator. Then the respondent (appellant) executed the letter of appointment in which it expressly acknowledged and confirmed the existence of disputes and differences between it and the claimant (respondent) and thereafter it appeared before the arbitrator, received directions and had also requested for further and better particulars of the claimant's (respondent's) points of claim and requested time to file its points of defence. All the actings of the respondent (appellant) which I have just referred to were positive and affirmative in nature and when viewed as a whole show that throughout the whole period before and during the arbitration the respondent (appellant) (as well as the claimant (respondent)) had proceeded on the assumption that there were disputes and differences which had arisen between the claimant (respondent) and respondent (appellant) which had been referred to the engineer for a decision which now required to be arbitrated. It would be unconscionable and unjust to now allow the respondent (appellant) to resile from that position and assert lack of jurisdiction on the part of the arbitrator.

[17] We agree with the findings of the learned judge. In *Jones Engineering*, the court there also held:

> (2) From the inception of the arbitration, and all the way through, there was an agreed assumption that there was a valid arbitration agreement in being in terms of cl 3 of DOM/1. That agreed assumption was acted upon throughout the arbitration proceedings. It would be most unconscionable to allow Balfour Beatty to depart from that agreed assumption, seeing that Jones had incurred very substantial costs, both in their preparation for the hearing and in their pleadings and in interlocutory matters and in 13 full or part days of hearing, including legal representation, calling of witnesses, etc in reliance on that assumption. An estoppel by convention arose which prevented Balfour Beatty from going back on the agreed assumption that a valid arbitration agreement on the terms of cl 3 existed.

[18] In our case, it is clear that the appellant, in view of its conduct as stated in the 16 items in the statement of agreed facts at pp 346–349 of the appeal record, is not now entitled to dispute the validity of the arbitration proceedings. The appellant had

participated in the arbitration proceedings from the inception. The parties had intended the letter of appointment to be binding on them and there was no mistake with regard to that. The learned judge was therefore correct in permitting the estoppel to be raised and answering the questions that the arbitrator was validly appointed and had jurisdiction to hear the matter. In our view, the learned judge answered questions 3, 4 and 5 correctly.

[19] My learned brother, Arifin Zakaria FCJ has seen this judgment in draft and has expressed his agreement with it. However, my learned brother Abdul Kadir Sulaiman FCJ has since retired and has no opportunity to see the judgment in draft.

Appeal dismissed with costs.

Reported by John Paul Simon